



US4C1977-1188-05

# AMICUS BRIEF

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

No. 77-1144

ELTRA CORPORATION

Appellant

-against-

BARBARA A. RINGER,

Appellee

BRIEF AMICUS CURIAE OF  
INTERNATIONAL TYPOGRAPHIC COMPOSITION  
ASSOCIATION AND ADVERTISING TYPOGRAPHERS  
ASSOCIATION OF AMERICA, INC.

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

ELTRA CORPORATION

Appellant

No. 77-1188

Respondent

BARBARA A. HINGLE

Appellee

BRIEF AMICUS CURIAE OF  
INTERNATIONAL TYPOGRAPHIC UNION, TYPE-  
WRITER ASSOCIATION AND ADVERTISING TYPEWRITERS  
ASSOCIATION OF AMERICA, INC.

PRELIMINARY STATEMENT

The Action and the Parties

This is a test case brought by a large manufacturer of typewriting equipment, Eltra Corporation, against the Register of Copyright. Eltra seeks to make use law by obtaining copyright protection for the shape of an alphabet and other typographic symbols printed on devices used in combination with Eltra equipment. These shapes are not usually noticed by ordinary readers.

The action is in the nature of mandamus and seeks to compel the Register to recognize such copyright by grant of



....

There is application for registration. Also, there are a number of small typewriters and typewriter equipment and typewriters from there. They are these machines as general use of various time for the printer.

Also, the applicant is a company to remove and related forms from the public domain through the use of

The Decision below

There is no summary judgment for the relief in regard to the complaint and the defendant's motion for dismissal of the complaint. Relying on the agreement of the parties that there was no genuine issue of material fact, the United States District Court for the Eastern District of Virginia granted the Registrar's motion and dismissed the complaint. Also, respectfully submit that the Registrar was entitled to summary judgment of this because the essence of the complaint and other exhibits designed for the use of the defendant's subject matter under the copyright statute. The defendant's motion should be granted.

Summary of facts

The nature of the case is set forth in some detail in the brief affidavit of the defendant and the plaintiff's motion for summary judgment. The defendant's motion for summary judgment is filed this brief. The

...to be used in the ... ..  
... ..  
... ..  
... ..  
... ..

There are a handful of manufacturers of ...  
... ..

2. These manufacturers have ... ..  
... ..  
... ..  
... ..  
... ..

These devices are not compatible or interchangeable  
with other different equipment

3. Instead for many modern designs of ... ..  
... ..  
... ..  
... ..  
... ..  
... ..

4. These designs do not ... ..  
... ..  
... ..  
... ..  
... ..

These countries will require a lot of help  
in the way of equipment and other things. The equipment  
needed is not very much, but the cost of getting it  
and maintaining it is high. The United States is not  
able to supply the equipment and other things that  
these countries need. It is for this reason that the  
United States is not able to supply the equipment and  
other things that these countries need.

#### QUESTIONS AND ANSWERS

Is the shape of an airplane changed in the way you  
lifting the wings for increasing and decreasing the lift  
and so other things like that under the Wright system?

#### ANSWERS

1. The Supermarine is now  
in the air.

The United States is being asked to participate in the making  
of new law after the question of copyright and copyright law  
has been taken up. It is submitted that the purpose  
of Congress to protect copyright law is not  
to protect the public in the present law but after the  
1911 law. In the passage of a comprehensive copyright law  
in 1911, the United States signed the Berne Convention  
which is a copyright convention by which the United  
States is bound. The United States is now in the  
position of having to sign the new law. It is  
for this reason that the United States is now in  
the position of having to sign the new law. It is  
for this reason that the United States is now in  
the position of having to sign the new law.





any number of ways. For example, if a person has the appropriate reputation, if an organization is involved and other the person one of the officers or directors and might represent authority.

These persons in addition should be asked to the appropriate question and answer. These are light and do so on for a number of reasons.

(1) We believe that the person and should be required if on this control ground to be on public conduct and otherwise some of the other things and it is possible question. This person is concerned with the long-term and principle that (person) might not be able to determine if some of the other things that are in the public interest. We believe that the person should be asked to the appropriate question and answer. These are light and do so on for a number of reasons.

(2) We believe that the appropriate party to the case should be the authority of the person to the appropriate person.

(3) The case of the person should be the person to the authority of the person. The person should be asked to the appropriate question and answer. These are light and do so on for a number of reasons.









people simply see effective type as a vehicle which does in fact. This is applicable to the present situation as the questionable combination of large letters in figures 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

The function of typeface designs particularly fits for denial of protection since shapes of alphabets are the raw material of words and language. The public policy against encumbering our alphabet with claims of private property is supported by cases in many different contexts emphasizing the need for keeping the public domain truly public. See, e.g., Baker v. Sellen, 101 F.2d 92 (1936); Ed. Stewart Enterprises, Inc. v. Random House, Inc., 106 F.2d 101 (1st Cir. 1941); Flow, Inc. v. Bernard Gott, Inc., 291 F.Supp. 110 (S.D.N.Y. 1968). As stated in MacGregor v. Proulx, 408 F.2d 1115 (1st Cir. 1969): "We cannot recognize copyright as a game of chess in which the public can be checkmated."

- This conclusion is also valid when the argument depicted in MacGregor is used. That plaintiff's work is not in the public domain is difficult to tell from the



Under these principles courts have been alert to prevent appropriation of the basic ingredients of the public vocabulary. For example in Berlin v. E.C. Publications, Inc., 328 F.2d 541 (2d Cir. 1964) the court expressed a doubt that "even so eminent a composer as plaintiff Irving Berlin should be permitted to claim a property interest in 'basic pentadeter'". Cf. Allegro-Silver Co. v. Andrea Duro, Inc., 466 F.2d 105 (7th Cir. 1972); Smith v. Muchlebach Brewing Co., 140 F.Supp. 779 (S.D. Md. 1956); Forstmann-Woelke Co. v. J.W. Mays, Inc., 89 F.Supp. 964 (E.D.N.Y. 1950). To paraphrase even so eminent a designer as Herman Zapf should not be permitted to claim a property interest in the letter "A".

Plaintiff seeks to avoid the thrust of the foregoing reasoning and authority by arguing that Mr. Zapf's ingenuity transforms the alphabet into a work of art. The product is before the court in Exhibits "A" and "B" to the Parker affidavit (A 34-35). We respectfully submit that this case can begin and end upon a visual examination of this alphabet by the Court.

Plaintiff itself concedes the difficulty of discerning the differences between one typeface and another. For example in the elaborate booklet printed by plaintiff for submission to the Copyright Office (Exhibit "C" to the Parker affidavit) it is stated at pages 40-41 that "to the untrained eye, Times and Plantin [two typefaces] may appear identical.

We thus are faced with a class of work with respect to which the untrained eye or ordinary observer neither perceives nor, we submit, cares about difference. This characteristic of typeface design in and of itself should mean that copyright is inappropriate. It does seem among other things that a court would in all cases be unable to apply the recognized standard of determining similarities and differences for purposes of infringement articulated in Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960) as follows: "[T]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them and regard their aesthetic appeal as the same. That is enough."

The courts have increasingly emphasized the necessity of applying this "ordinary observer" test to the question of copyrightability as well as to the question of infringement. See, e.g., Vogue King Creations, Inc. v. Harlan, 412 F.Supp. 809 (D.R.I. 1976). In L. Harlan & Son, Inc. v. Snyder, 510 F.2d 446, 453 (2d Cir. 1974), the Court of Appeals for the Second Circuit, in an en banc reversal of an earlier decision of a three judge panel, rejected copyrightability in a bank in the shape of Uncle Sam. The Court found differences between that bank and a public domain version which are not perceptible to the "ordinary observer" (emphasis added).

It is not enough for plaintiff to argue that experts might dissect its alphabet shapes and find them different from others. Indeed, the District Court's observations that Eltra's design is "substantially different" from earlier designs (Findings, A 51) is of no significance, being based on the technical "conceptual principle known as Super Ellipse -- that is, a squared-off circle." (Id.) Copyright cases make many key distinctions between experts and laymen. See, e.g., Funkhouser v. Loews, Inc., 208 F.2d 185, 188 (8th Cir. 1953), cert. denied, 348 U.S. 843 (1954). In Gardenia Flowers, Inc. v. Joseph Marcovitz, Inc., 280 F.Supp. 776 (S.D.N.Y. 1968), the court noted, in rejecting copyrightability for an artificial flower, that "even a botanist's inspection which might reveal an unusual vein pattern in some of the leaves or abnormal stem configuration would be irrelevant."

The ordinary observer standard in no way injects aesthetics into this situation. In Kleinstein v. Donaldson Lith. Co., 188 U.S. 239 (1903), the Supreme Court was emphasizing the popular appeal of a circus poster, just as Judge Clark in Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955), disclaimed a judicial right to overrule public appreciation of a chimpanzee television character. These cases merely show that where the public perceives and cares, a work should be considered art, irrespective of aesthetic judgments. We sub-

.....

mit that no ordinary observer would purchase a book because it is set in ORION type

It is true that Section 5 of the copyright statute states that the classes of works such as "works of art" are not exhaustive. But plaintiff has failed to cite any instances in which protection was granted to a work not falling within these classes. And it has been noted in Nimmer on Copyright §12 21, pp. 47-48, as follows

"The implicit (and sometimes explicit) assumption of the courts and of the Copyright Office is that only such works as are enumerated in Section 5 are eligible for copyright. No reported decision indicates a validation of copyright except where the work in question fits into one of the Section 5 categories."

Nor does any other statutory language aid Eltra Goldstein v California, 412 U S 546 (1973) stands for the proposition that the term "writings of an author" in Section 4 of the copyright statute is not co-extensive with the term "writings" of "authors" in the Constitution. As stated by Chief Justice Burger "Since §4 employs the constitutional term 'writings,' it may be argued that Congress intended to exercise its authority over all works to which the constitutional provision might apply. However, in the more than 60



years which have elapsed since enactment of this provision  
neither the Copyright Office, the courts nor Congress has  
so interpreted it." 417 U.S. at 367 [emphasis added]

3 The Authorities Cited in Eltra's  
Brief Do Not Support Reversal

Brief comment may be made on several matters raised  
in the first point of Eltra's brief (pp. 6-18)

1 Professor Stinner's "assertion" referred to on  
page 9, n. 6 of Eltra's brief, was "submitted on behalf of the  
Hauptshuler Linotype Company", i.e., plaintiff herein, in  
connection with the "typoface hearing" held by the Register

2 The history of the 1909 Act, as finally imple-  
mented by Plant v. Baugh, 347 U.S. 281 (1954), referred to on  
pages 6 and 9 of Eltra's brief, merely demonstrates that a  
work may be protected even if it is not a work of fine art.  
This does not mean that everything that is not fine art is  
protected.

3 Webster's definition of "art" as "the applica-  
tion of knowledge or skill in effecting a desired result" quoted  
on page 7 of Eltra's brief clearly shows that the word "art"  
in the copyright statute cannot be taken in its broadest sense

### CONCLUSION


The design in question relates basically to the shape of an alphabet. It is embodied on a device used in conjunction with typesetting machines to produce type. The economic setting of the pertinent industry involved is unusual. The Register of Copyrights held an unprecedented full-scale administrative hearing. Extensive testimony and written submissions failed to convince the Register to abandon the long standing practice of her office to deny registration to typeface designs as expressly embodied in regulations, 17 C.F.R. (222.1(a)), and produced the present pending action. Simultaneously, the Copyright Law has been completely revised and Congress has in the words of the House Judiciary Committee, "considered, but chosen to defer, the possibility of protecting the design of typeface" House Report, p. 33 (1976)\*. Against this background, it is submitted that

- .....
- \* A question has even been raised as to whether typeface should be included in a sharply limited form of protection which the House Judiciary Committee has suggested for the 91st Congress. House Report at 30. This form of protection, which could incorporate compulsory licensing and other protective provisions available to a court, could be supported by various arguments of the industry. Plaintiff's quest for judicial recognition of broad and unqualified protection cannot. That only a legislative action can provide the delicate mechanisms required to balance all economic interests has been repeatedly made clear in copyright cases. See e.g., Forrestally Corp. v. United Artists Television, Inc., 192 F.2 190, 401, 520 (1948); William S. Gilman Co. v. U.S., 487 F.2d 145, 146, 148, 451 F.2d 1001, 1002 (1971); U.S. v. Sybil Court, 520 U.S. 376 (1975).

this Court should afford the dissent of this action which  
wants copyright protection for the shape of an alphabet

Unsuccessfully submitted

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**§ 101. Subject matter of copyright: In general**

(a) Copyright protection subsists, in accordance with this title, in original works of authorship that are fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, in any form or by any means, electronic or mechanical, including copying and recording, except as otherwise provided in this title.

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, or device, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or represented in any work.



[illegible][illegible]

The Council of the City of New York has been organized and is now in the process of making a general survey of the city and its various departments. It is the duty of the Council to see that the city is properly governed and that the interests of the people are protected. The Council is composed of the Mayor, the Comptroller, and the members of the Board of Aldermen. The Mayor is the chief executive officer of the city and is responsible for the execution of the laws and the management of the city's affairs. The Comptroller is the chief financial officer and is responsible for the city's revenues and expenditures. The Board of Aldermen is the legislative body of the city and is responsible for the passage of laws and the oversight of the city's operations. The Council is also responsible for the appointment and removal of the city's officers and employees. The Council is a powerful body and is the most important institution in the city's government. It is the Council that makes the decisions that affect the lives of the people of New York City.

[illegible][illegible]

disposition, only in a few cases, and even then, it is not always the same. In some cases, the disposition is a result of a specific cause, such as a change in the environment, or a change in the individual's state of mind. In other cases, the disposition is a result of a more general cause, such as a change in the individual's personality, or a change in the individual's values.

#### Disposition of the individual

In a broad sense, the disposition of an individual is a result of a number of factors, including the individual's environment, the individual's state of mind, the individual's personality, and the individual's values. The disposition of an individual is a result of a number of factors, including the individual's environment, the individual's state of mind, the individual's personality, and the individual's values. The disposition of an individual is a result of a number of factors, including the individual's environment, the individual's state of mind, the individual's personality, and the individual's values. The disposition of an individual is a result of a number of factors, including the individual's environment, the individual's state of mind, the individual's personality, and the individual's values.

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The above information was obtained from the files of the FBI - Chicago Division & contains no confidential sources or methods of investigation.

[illegible]

1. The first characteristic of the "philosophical" approach is its emphasis on the "scientific" method. This approach is based on the idea that the world can be understood through the application of scientific principles. It is a method that is based on the idea that the world is a system of cause and effect, and that the only way to understand it is through the application of scientific principles. This approach is based on the idea that the world is a system of cause and effect, and that the only way to understand it is through the application of scientific principles.

[illegible][illegible]



\_\_\_\_\_

The Board of Directors of the company has the honor to acknowledge the receipt of your letter of the 10th inst. in relation to the proposed change in the name of the company. The Board has considered the matter and has decided to decline the offer. The Board has also decided to continue the company under its present name.

[illegible][illegible][illegible][illegible]











proving system, or other means that have been found to be suitable for the purpose. The copyrightable work is defined as the composition of words, and not the material medium of expression. The word "composition" is used in the sense of the word "composition" in the dictionary. The word "composition" is used in the sense of the word "composition" in the dictionary. The word "composition" is used in the sense of the word "composition" in the dictionary.

As a result of the above, the word "composition" is used in the sense of the word "composition" in the dictionary. The word "composition" is used in the sense of the word "composition" in the dictionary. The word "composition" is used in the sense of the word "composition" in the dictionary. The word "composition" is used in the sense of the word "composition" in the dictionary.

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Second, countries that have an unusual land geography or competitive price regime should national protection for the commodities or programs adapted for the program. A price ceiling might merely be a device for producing the same effect as a tax, thereby increasing domestic supply, or a situation that the commodities adapted for the program are either in significant demand or supply for programs in which the actual program or methods included in the program are not within the scope of the commodity law.

Section 1071 is not an embargo or restraint on the scope of copyright protection under the present law. Its purpose is to ensure that the content of the new public domain system of copyright that the House Judiciary Committee approves and also remains undisturbed.